OPINION OF ADVOCATE GENERAL MISCHO

delivered on 3 May 2001 [1]

1. This case again raises a problem which has already been considered by the Court several times, namely the interpretation of Community law on the temporary posting of workers who are nationals of the European Union by undertakings established in one Member State ('the State of origin') to the territory of another Member State ('the host State') in the context of a transnational provision of services.

The German legislation on employment terms which are mandatory for cross-border services

2. The Arbeitnehmerentsendegesetz (German statute laying down mandatory terms of employment for posted workers, hereinafter 'the AEntG'), in the version of 26 February 1996 applicable to the instant case, applies to the construction industry.

3. The first sentence of Paragraph 1(1) of the AEntG extends the applicability of certain universally binding collective agreements to employers having their seat abroad and to their workers posted to Germany. That provision is worded as follows:

'The legal provisions laid down in a collective agreement in the construction industry declared to be universally binding within the meaning of Paragraphs 1 and 2 of the Baubetriebe-Verordnung (Regulation on the Building Industry) ... , shall also apply in so far as the undertaking is principally engaged in providing building services within the meaning of Paragraph 75(1), point 2, of the Arbeitsförderungsgesetz (Law on the Promotion of Employment) ... and German law is not in any event determinative for the employment relationship, to an employment relationship binding an employer established abroad and his employee working within the territorial scope of that collective agreement, where and to the extent to which

(1) the collective agreement lays down a single minimum wage for all workers within its scope of application and

1 — Original language: French.

(2) domestic employers established outside the territorial scope of application of that collective agreement must also guarantee their employees working within the territorial scope of application of the collective agreement at the very least the collectively agreed work terms in force at the place of work.'

4. According to the third and fourth sentences of Paragraph 1(1) of the AEntG, an employer, within the meaning of the first sentence, is required to guarantee his posted workers the employment terms provided for in the first sentence of that paragraph.

5. Under Paragraph 5 of the AEntG, a breach of the mandatory provisions of Paragraph 1 of that statute is punishable as a civil offence. Under Paragraph 29a of the Gesetz über Ordnungswidrigkeiten, the court may order the forfeiture of financial advantages obtained through conduct which is punishable by a fine.

6. On 2 September 1996, the social partners in the German construction industry concluded, with effect from 1 October 1996 but at the earliest from the date of entry into force of its universal applicability, a collective agreement laying down a minimum wage in the construction sector in the Federal Republic of Germany (hereinafter 'the collective agreement').

7. This was declared universally binding on 12 November 1996 but effective only as of 1 January 1997.

8. The national court also points out, however, that under German law governing collective agreements, the social partners may conclude collective agreements at various levels, at the federal level as well as at the level of an undertaking. In this regard, collective agreements specific to an undertaking in principle take precedence over more general collective agreements.

Facts in the main proceedings

9. Portugaia Construções Ld[a] ('Portugaia') is a company established in Portugal. Between March 1997 and July 1997, it carried out structural building work in Tauberbischofsheim. In order to carry out that work, it posted several of its employees to Germany.

10. In March and May 1997, the Arbeitsamt (Employment Office) in Tauberbischofsheim carried out an investigation into the employment conditions on that building site. On the basis of the documentation submitted, it concluded that Portugaia was paying the workers who had been the object of the inspection a wage lower than the minimum wage payable under the AEntG. It accordingly ordered the forfeiture of the unpaid balance, that is to say the difference between the hourly wage payable and that actually paid, multiplied by the total number of hours worked, a total of DEM 138 018.52.

11. The case to be decided by the referring court is an appeal brought by Portugaia against that forfeiture decision.

12. The national court has doubts about the compatibility of the German legislation with Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC). It points out that, according to the explanatory memorandum of the AEntG, its objective is to protect the national labour market (in particular against 'social dumping' resulting from an influx of low-cost labour), to reduce national unemployment and to enable undertakings in the Federal Republic of Germany to adapt to the internal market. The national court also observes that, unlike German employers, employers from other Member States do not have the option of entering into more specific collective agreements with a German trade union in order to avoid the application of the collective agreement.

13. Taking the view that the case depended on an interpretation of the relevant Community rules, the Amtsgericht (Local Court) Tauberbischofsheim stayed the proceedings and, by order of 13 April 1999, referred the following questions to the Court for a preliminary ruling:

'(1) Is an interpretation of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [2] or, if that directive is not applicable, an interpretation of Article 59 et seq. of the EC Treaty, under which overriding requirements of public interest capable of justifying a restriction on the freedom to provide services in cases involving the posting of employees can lie not only in the social protection of the employees posted but also in the protection of the national construction industry and the reduction in national unemployment for the purpose of preventing social tension, consistent with Community law?

(2) Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a domestic employer can pay less than the minimum wage laid down in a collective agreement declared to be generally binding by concluding a collective agreement specific to one under-

2 — OJ 1996 L 18, p. 1.

taking (and enjoying precedence) whereas this is — at least in fact — not possible for any non-German EC employer when he plans to post workers to the Federal Republic of Germany?'

ing from an influx of low-cost labour), to reduce national unemployment, and to enable undertakings in the Federal Republic to adapt to the internal market. The obligation imposed by the statute is therefore not intended to guarantee the social protection of posted workers. In reality, it tends to make matters more difficult for employers from other Member States who post their workers to carry out construction work in the Federal Republic'.

The first question

14. The referring court explains its first question above by noting that Portugaia 'would be under no legal obligation to pay the minimum wage payable under the collective agreement if that obligation was incompatible with Article 59 et seq. of the Treaty. According to the case-law of the Court, a (non-discriminatory) restriction on the freedom to provide services established by Article 59 et seq. of the Treaty can be justified by overriding requirements in the public interest only if that interest is not already safeguarded by the rules of the State of origin and if the restriction is proportionate ... According to the case-law of the Court, overriding requirements in the public interest, in the present case of the posting of construction industry workers, can relate only to the social protection of the workers ... '.

15. In this regard it adds that '[t]he national rules laid down in Germany by the statute on the posting of workers run counter to the social interests of the posted employees. The objective of the statute, according to its explanatory memorandum, is to protect the national labour market (in particular against "social dumping" result-

16. It deduces from this that '[n]ational rules on posting workers the purpose of which is to protect the national labour market and which prevent employers from other Member States from exploiting an economic advantage based on lower wage costs are based on the premiss that that economic advantage constitutes a distortion of competition'.

Preliminary observation

17. The referring court asks the Court for an interpretation of Directive 96/71 or, if that is not applicable, of Article 59 et seq. of the Treaty.

18. The Netherlands Government submits that the first question does not have to be considered in the light of Directive 96/71.

The reason being that 'in relation to the application of Directive 96/71 ratione temporis, Member States are required to comply with that directive by 16 December 1999 at the latest. Directive 96/71 is not capable of producing direct effect before that date. Before that date, Directive 96/71 is relevant to the national court only when reviewing the legality of national measures having regard to the obligation of Member States to refrain, during the period laid down for its implementation, from taking measures liable seriously to compromise the result prescribed by that directive (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraphs 45 and 46). The order for reference contains nothing disclosing circumstances of that kind ... '.

19. I concur with the Netherlands Government in its analysis.

20. The AEntG, in the version of 26 February 1996 applicable to the instant case, predates Directive 96/71, which was adopted on 16 December 1996. As the German Government explained at the hearing, the AEntG was subsequently amended in 1998 to bring it into line with the directive. [3] It must therefore be concluded that the Directive had not been transposed into German law at the material time.

21. As the Court held in *Mazzoleni*, which also concerns Directive 96/71, '[s]ince the period prescribed for the implementation of the Directive had not in fact expired and the Directive had not been transposed into national law at the material time, it is not necessary to interpret its provisions for the purposes of the main proceedings'. [4]

22. The Portuguese Government also examines the question asked by the national court in the light of Article 48 of the EC Treaty (now, after amendment, Article 39 EC). For reasons already explained in my Opinion in *Finalarte*, [5] I take the view that the posting of employees by an undertaking from one Member State to another does not fall within the scope of that provision.

23. The question asked by the referring court should therefore be answered by reference only to Article 59 et seq. of the Treaty.

3 — See also the written explanations of the Portuguese Government according to which a deadline laid down in Paragraph 10 of the AEntG was deleted when it was amended in 1998 'in order to enable the German State to comply with the obligation imposed by Community law to transpose Directive 96/71 into national law within the time-limit laid down for that purpose by Article 7 of the Directive'.

4 — Case C-165/98 [2001] ECR I-2189, paragraph 17.

5 — Opinion of Advocate General Mischo delivered on 13 July 2000 (in Cases C-49/98, C-50/98, C-52/92 - C-54/98 and C-68/98 - C-71/98, judgment of 25 october 2001, ECR I-7831, I-7835, points 29 and 30).

Observations of the parties

24. *Portugaia* submits that the purpose of the German legislation and the collective agreement concerned is to protect the German construction sector from foreign competition and to provide jobs for German construction workers by bringing about a reduction in the number of foreign workers posted to Germany.

25. It argues that it is placed at a disadvantage compared to German undertakings, contrary to Article 49 EC, for the following reasons.

26. First, Portugaia points out that 'Paragraph 2(3) of the collective agreement establishes special rules for construction sector employers established outside Germany, which do not include the collective agreement provisions applicable to German employers which benefit the latter, and thus impose different burdens on Germans and non-Germans'.

27. Specifically, Paragraph 2(3) of the collective agreement provides that the minimum wage within the meaning of Paragraph 1(1) of the AEntG is composed of the wage specified in the collective agreement and a 'construction supplement (Bauzuschlag)' of 5.9%. Part of this supplement, corresponding to 0.5% of the minimum wage, is intended to compensate for loss of earnings occurring during the statutory bad weather period ('Schlechtwetterzeit'). However, whereas the German worker has no right to be paid when work has to stop due to bad weather, the same is not true of the Portuguese workers. The balance of the 'construction supplement' (5.4% of wages) is to recompense workers for sacrifices made by them: 2.5% by way of a supplement to compensate for the special inconveniences they have to endure, in particular because of continual changes of building site, and 2.9% to compensate for the consequences of bad weather outside the statutory bad weather period. However, under the second sentence of Article 2(3) of the collective agreement, non-German employers are still required to pay supplements payable under foreign law, even if they serve the same purpose as the construction supplement.

28. Portugaia also points out that under Article 16 of the Federal framework collective agreement for the construction industry ('Bundesrahmentarifvertrag für das Baugewerbe — BRTV-Bau') German workers' claims on their wages are time-barred two months after payment becomes due. This provision does not apply to foreign employers. Even if, under the relevant national law, there was a foreign provision laying down a time-limit for such claims, they could not rely on such a provision because of the mandatory nature of the AEntG.

29. Secondly, Portugaia argues that the level of the minimum wage in question is not justified by overriding requirements in the public interest. It points out that the minimum hourly wage of DEM 17 (or DEM 15.64 in five *Länder*) is higher than the minimum wages set by collective agreements in other sectors of industry where the work is equivalent in nature, for example wages in the steel industry or in agriculture.

30. Thirdly, Portugaia submits that German employers are not subject to the provisions of the AEntG imposing criminal penalties in the event of failure to observe the right to the minimum wage.

31. Portugaia therefore suggests that the Court answer the first question to the effect that 'an interpretation of Directive 96/71 and an interpretation of Articles 39, 49 and 50 EC and the provisions of the law and of the collective agreement based on that interpretation, under which overriding requirements of public interest capable of justifying a restriction on the freedom to provide services in cases involving the posting of employees can be allowed in the interest not only of the social protection of the employees posted but also in an economic interest such as that of the protection of the national construction industry against international competition, the reduction in national unemployment and for the purpose of preventing social tension, are incompatible with Community law'.

32. The *German Government* takes the view that the scheme of the German statute and the policy reasons behind it are not relevant for the purposes of the answer to the first question referred. The question concerns the interpretation of Community law and of the directive, and not the interpretation of the German statute.

33. After referring to the fifth recital of Directive 96/71 and the case-law of the Court, the German Government proposes that the Court should answer that 'it is not contrary to Community law for Directive 96/71 ... to include, among the overriding requirements of public interest capable of justifying a restriction on the freedom to provide services in cases involving the posting of employees, not only the social protection of the employees posted but also the protection of the national construction industry and the reduction of national unemployment for the purpose of preventing social tension'.

34. The *French Government* submits that 'it is not contrary to Community law for a Member State to extend the application of the provisions of its collective agreements to any person in paid employment, including a posted worker, within its jurisdiction, irrespective of the Member State in which the employer of that worker is established, provided that such provisions do not entail any discrimination calculated to protect the construction industry'.

35. The *Netherlands Government* notes that the purpose of the AEntG is to protect the national labour market (in particular against 'social dumping' resulting from an influx of low-cost labour), to reduce national unemployment and to enable German undertakings to adapt to the internal market.

36. It points out that, according to the case-law of the Court, overriding requirements of public interest cannot include 'objectives of an economic nature'. It infers from this that 'the objective of the AEntG cannot therefore justify a restriction on the freedom to provide services'.

37. The *Portuguese Government* takes the view that 'Article 49 et seq. EC and Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services preclude the application of national legislation entailing a restriction on the freedom to provide services based on overriding reasons of public interest relating to the social protection of the employees posted, the protection of the national construction industry and the reduction of national unemployment for the purpose of preventing social tension, where those reasons are clearly manifest, beyond possible doubt, in the ratio legis, and not merely set out in the explanatory memorandum to the law'. The preamble to the law, in the view of the Portuguese Government, is no more than an indication of the legislative intent and it is only one of the factors to be considered.

38. Moreover, the Portuguese Government argues that 'the requirement, for an undertaking established in one Member State, to pay its employees posted to another Member State, in the course of a provision of services, the minimum wage laid down (for construction workers) in a collective agreement which is universally binding in that Member State is not contrary to the provisions of Article 49 et seq. EC, where the requirement flows directly from the Community rules on free movement of workers, in particular Council Regulation No 1612/68 of 15 October 1968, Directive 96/71, and the case-law of the Court of Justice of the European Communities'.

39. The *Commission* submits that reasons of pure structural policy, such as the protection of the national construction industry, cannot serve to justify a restriction on the freedom to provide services. None the less, the Commission does not share the national court's view that a rule extending minimum wage provisions to foreign service-providers is not justified by overriding reasons of public interest and is in fact contrary to the interests of the posted workers.

40. Moreover, in order to justify a restriction on the freedom to provide services it is sufficient if a rule is objectively calculated to promote the social protection of workers. The fact that it may at the same

time have repercussions in other spheres does not affect its status as a reason justifying a restriction.

41. The Commission therefore suggests that the first question referred by the national court be answered as follows:

'Article 49 EC is to be interpreted as meaning that national legislation extending to foreign service providers and their posted employees the minimum wage provisions imposed by collective agreements in the construction industry and declared to be universally binding is justified by overriding reasons relating to the social protection of the workers, irrespective of the fact that the legislation is also aimed at achieving other objectives, in so far as it does not go beyond what is absolutely necessary for the attainment of the social protection objective.'

Analysis

42. As explained by the national court (see paragraphs 15 to 17 above), the case before it concerns host State legislation requiring employers from the State of origin to pay a minimum wage to their employees posted to the host State and one of the objectives of which is to protect the national construction industry and reduce unemployment.

43. In the light of this objective, the referring court wonders as to the validity of an interpretation of Article 59 et seq. of the Treaty under which 'overriding requirements of public interest capable of justifying a restriction on the freedom to provide services in cases involving the posting of employees can lie not only in the social protection of the employees posted but also in the protection of the national construction industry and the reduction in national unemployment for the purpose of preventing social tension'.

44. I believe I have answered this question in my Opinion in *Finalarte*. In that opinion, I noted that Member States remain free to determine the level of social protection they wish to accord to their workers and that 'if service providers established in other Member States could circumvent the level of social protection existing in the host Member State, that protection would, without doubt, ultimately be jeopardised because employers established in that Member State would seek a reduction of the level of protection in order to be able to compete on equal terms with the undertakings providing services'. [6]

6 — Points 41 and 42 of the Opinion.

45. In point 36, I observed that 'even if views were expressed during the political debate preceding the adoption of the AEntG, and expressions used in the introductory summary of that law itself, which could give rise to the impression that, in this case, it concerned the protection of an economic sector against foreign competition, we can only examine the content of that law and the other relevant texts in order to determine whether, objectively viewed, they guarantee to posted workers, as the German Government asserts, a level of social protection identical in substance to that enjoyed by workers in the construction industry who are established in Germany'.

46. I therefore take the same view as the German and Portuguese Governments and the Commission, that what determines whether a national law gives rise to an unjustified restriction is not the legislative intent, as expressed in an explanatory memorandum or otherwise, but the effects which the law actually produces, through its operative provisions, on the freedom to provide services.

47. With regard to those operative provisions, the referring court points out that '[t]he AEntG requires forfeiture of the gain accruing to a German or non-German employer who fails to pay posted employees the minimum wage laid down in a collective wage agreement declared to be universally binding ... '.

48. However, as the Portuguese Government and the Commission observe, the mere fact that an undertaking established in one Member State is obliged to pay employees posted to another Member State in the course of a provision of services the minimum wage laid down (for construction workers) in a collective agreement which is universally binding in that Member State is not contrary to the provisions of Article 59 et seq. of the Treaty.

49. It has been held by the Court that 'Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the employer is established, and, moreover, that Community law does not prohibit Member States from enforcing those rules by appropriate means'. [7]

50. That does not mean that there may not be 'circumstances in which the application

7 — Case C-369/96 *Arblade and Others* [1999] ECR I-8453, paragraph 41. See also Joined Cases 62/81 and 63/81 *Seco* and *Desquenne & Giral* [1982] ECR 223, paragraph 14, and Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12.

of such rules would be neither necessary nor proportionate to the objective pursued, namely the protection of the workers concerned'. [8] Hitherto, the Court has acknowledged the existence of such circumstances only in the case of an 'undertaking established in a frontier region, some of whose employees may, for the purposes of the provision of services by the undertaking, be required, on a part-time basis and for brief periods, to carry out a part of their work in the adjacent territory of a Member State other than that in which the undertaking is established'. [9]

51. It must be noted, however, that the national court does not cite any such exceptional circumstances in its order for reference. It simply refers to the fact that Portugaia is subject to the obligation to pay the minimum wage. But that, by itself, is not contrary to Article 59 et seq. of the Treaty.

52. As mentioned above (paragraphs 26 and 27), Portugaia makes the further point that the way the minimum wage is made up places it at a disadvantage vis-à-vis German employers. It refers to supplements comprised in the minimum wage which are designed, inter alia, to compensate for loss of earnings in certain periods when German employers do not have to pay wages. Yet Portugaia is obliged by Portuguese law to continue to pay its workers during such periods.

53. In its reply to a written question from the Court, the German Government states that 'there is no discrimination against foreign construction firms posting employees to Germany as alleged by the defendant in the main proceedings'. It submits that Portugaia 'misunderstands the legal nature of the construction supplement. With the evolution of the law of collective bargaining, the supplement has gradually lost its original function of compensating for specific forms of hardship and has today become, quite irrespective of its origins, a fixed component of the wage packet'.

54. However, the fact is that the referring court made no reference to the composition of the minimum wage, which, according to Portugaia, gives rise to a breach of Article 59 et seq. of the Treaty. The same applies, moreover, to Portugaia's arguments based on the difference in limitation periods for claims on unpaid wages, on the fact that the wage level is not justified by comparison to wage levels in other industries and on the fact that the criminal sanctions do not apply to German employers.

55. Since the referring court has not asked the Court whether those matters are capable of constituting a breach of

8 — *Mazzoleni*, cited above, paragraph 30.
9 — *Mazzoleni*, cited above, paragraph 31.

Article 59 et seq. of the Treaty and since it has not even mentioned those matters, it would not be appropriate for me to express a view on them.

56. For under Article 234 EC, only a court or tribunal of a Member State has the right to refer a question for a preliminary ruling. The parties have of course the right to make observations on the question asked but they do not have the right to submit to the Court what is in fact a new question in relation to the one asked by the referring court. The Court has expressed the rule in the following terms: 'in view of the division of jurisdiction laid down by Article [234 EC], it is for the national court alone to determine the subject-matter of the questions which it wishes to refer to the Court. The Court cannot therefore, at the request of a party to the main proceedings, examine questions which have not been referred to it by the national court'. [10] If in the light of the progress of the case the national court considers that it is necessary to obtain further interpretation of Community law it is for that court to make a fresh reference to the Court. [11]

57. In any event, if a question concerning Community law arises in connection with the aforementioned supplements, which it is for the national court to assess, it may be that the answer to the question is already provided by the existing case-law of the Court.

58. Accordingly, it is for the national court first to determine if the supplements referred to by Portugaia form part of the minimum wage. [12]

59. Secondly, if the supplements do form part of the minimum wage and if it is furthermore established that Portugaia, unlike German employers, must therefore pay a second time what it has already been required to pay under Portuguese law, which would constitute a restriction on freedom to provide services, [13] it is for the national court to determine whether the workers enjoy in the Member State of origin, by virtue of the payments already made by Portugaia, protection that is substantially comparable to that provided for by the national rules governing the supplements.

60. As the Court has held, '[i]t must be acknowledged that the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may constitute an overriding requirement justifying the imposition on an employer established in another Member State who provides services in the host Member State

10 — Case C-377/88 *SAFA* [1990] ECR I-1, paragraph 20. See also Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraphs 23 and 24.

11 — See Case 311/84 *CBEM* [1985] ECR 3261, paragraph 10, and Case 299/84 *Neumann* [1985] ECR 3663, paragraph 12.

12 — *Arblade*, cited above, paragraphs 43 to 47.

13 — *Arblade*, cited above, paragraph 50.

of obligations capable of constituting restrictions on freedom to provide services. *However, that is not the case where the workers employed by the employer in question are temporarily engaged in carrying out works in the host Member State and enjoy the same protection, or essentially similar protection, by virtue of the obligations to which the employer is already subject in the Member State in which he is established*'. [14]

61. I therefore propose that the answer to be given to the first question is that Article 59 et seq. of the Treaty is to be interpreted as meaning that a national measure extending to foreign service providers and their posted employees the minimum wage provisions imposed by collective agreements in the construction industry, declared universally binding, is justified by overriding requirements relating to the social protection of the employees, irrespective of the fact that the measure is also aimed at achieving other objectives.

The second question

62. The referring court asks secondly whether there is an unjustified restriction on the freedom to provide services under the EC Treaty where a domestic employer can pay less than the minimum wage laid down in a collective agreement declared universally binding by concluding a collective agreement specific to one undertaking (and enjoying precedence) whereas this is — at least in fact — not possible for a non-German EC employer proposing to post workers to Germany.

Submissions of the parties

63. Portugaia proposes that the Court answer that 'Articles 48, 59 and 60 of the EC Treaty must be interpreted as not having been complied with by the combined provisions of the first sentence of Paragraph 1(3) of the AEntG and the collective agreement on the minimum wage in the construction industry in Germany, because an employer established in Germany can offer poorer employment terms than under the collective agreement declared universally binding by entering into a more favourable collective agreement which replaces the collective agreement declared universally binding, whereas that is not an option for an employer established outside Germany posting employees to Germany'.

64. On the other hand, the German Government submits that 'the second question referred is inadmissible because it is of a purely hypothetical nature and the answer to the question is plainly not relevant to the

14 — *Arblade*, cited above, paragraph 51, emphasis added.

outcome of the main proceedings'. According to the German Government, 'the referring court raises the abstract risk of discrimination merely as a hypothetical possibility'. As far as it was aware, 'in the sectors in which foreign employers are required to abide by collective agreements in relation to the minimum wage and paid leave funds, there are no undertaking-specific collective agreements in force which stipulate more favourable employment terms from the perspective of the German employers concerned than those imposed by the AEntG'.

65. The French and Netherlands Governments and the Commission submit that the option given to German undertakings to enter into a collective agreement setting a lower minimum wage than that payable to posted workers by an undertaking established in another Member State creates discrimination based on nationality contrary to Community law and constitutes an unjustifiable restriction on the rules governing freedom to provide services.

66. The Commission adds, however, that in the context of the AEntG it is extremely doubtful whether such a situation could arise. None the less, in the Commission's view, it is for the national court to determine if it is possible, in practice, for a domestic employer to circumvent the minimum wage provisions of a collective agreement declared universally binding while a service provider from another Member State would be unable to do so.

67. The Portuguese Government submitted no observations on the second question.

Analysis

68. I must first respond to the German Government's argument that the question 'is plainly not relevant to the outcome of the main proceedings'.

69. The Court has consistently held [15] that '... it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action'.

15 — See, *inter alia*, Case C-230/96 *Cabour* [1998] ECR I-2055, paragraph 21.

70. That is not the case here, however.

71. It is apparent from the order for reference that Portugaia challenges the requirements imposed on it by the AEntG in relation to payment of the minimum wage, claiming that those requirements are contrary to Article 59 et seq. of the Treaty. In that light, it cannot be the case that a question which concerns a possible difference in the means available to German employers and foreign employers to avoid those requirements 'bears no relation to the actual nature of the case or the subject-matter of the main action'.

72. Likewise, it cannot be concluded that the second question is inadmissible on the ground that there is, as far as the German Government is aware, no undertaking-specific collective agreement in force which stipulates more favourable employment terms from the perspective of the German employer concerned than those imposed by the AEntG.

73. According to the case-law, 'the Court is bound to accept the national court's finding'. [16] The relevant finding in this case is that a domestic employer can 'pay less than the minimum wage laid down in a collective agreement declared to be generally binding by concluding a collective agreement specific to one undertaking (and enjoying precedence) whereas this is — at least in fact — not possible for any non-German EC employer when he plans to post workers to the Federal Republic of Germany'.

74. The answer to the question whether this situation is contrary to Article 59 et seq. of the Treaty must be in the affirmative, since any discrimination against employers from the State of origin vis-à-vis those of the host State is prohibited.

75. According to the third paragraph of Article 60 of the Treaty, 'the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions* [17] as are imposed by that State on its own nationals'.

76. But an employer from the State of origin who, unlike a host State employer, does not have any means — at least in practice — of avoiding the obligation to pay the minimum wage to its posted workers cannot pursue its activity in the State where the service is provided under the same conditions as are imposed by that State on its own nationals.

16 — *Arblade*, cited above, paragraph 49.

17 — Emphasis added.

77. The answer to be given to the second question is therefore that the third paragraph of Article 60 of the Treaty precludes a situation in which an employer established in another Member State cannot — at least in fact — pay less than the minimum wage laid down in a collective agreement declared universally binding by concluding a collective agreement specific to one undertaking (and enjoying precedence) whereas it is possible for a host State employer to do so.

Conclusions

78. I suggest the following answers to the questions referred by the Amtsgericht Tauberbischofsheim:

(1) Article 59 of the EC Treaty (now, after amendment, Article 49 EC) et seq. is to be interpreted as meaning that a national measure extending to foreign service providers and their posted employees the minimum wage provisions imposed by collective agreements in the construction industry, declared universally binding, is justified by overriding requirements relating to the social protection of the employees, irrespective of the fact that the measure is also aimed at achieving other objectives.

(2) The third paragraph of Article 60 of the EC Treaty (now, after amendment, the third paragraph of Article 50 EC) precludes a situation in which an employer established in another Member State cannot — at least in fact — pay less than the minimum wage laid down in a collective agreement declared universally binding by concluding a collective agreement specific to one undertaking (and enjoying precedence) whereas it is possible for a host State employer to do so.